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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY YUSUKE SHIGA,

Defendant and Appellant.

B303095

(Los Angeles County
Super. Ct. No. KA097949)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Affirmed as modified and remanded with directions.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gregory Yusuke Shiga was convicted of aggravated arson, arson of a structure, arson of an inhabited structure, possession of flammable material, and second degree burglary arising from a fire in 2011 that burned down St. John Vianney Catholic Church in Hacienda Heights. The jury also found true the special allegations the arson was caused by use of a device designed to accelerate the fire or delay ignition; Shiga proximately caused multiple structures to burn; and Shiga caused property damage exceeding \$3.2 million. The trial court sentenced Shiga to an aggregate state prison term of 18 years to life. In *People v. Shiga* (B256009) 34 Cal.App.5th 466 (*Shiga II*),¹ we reversed Shiga's convictions on counts 2 and 5 for arson of an inhabited structure and arson of a structure, respectively, because they are forms of the same offense of simple arson. We remanded for the People to elect on which count they wanted to proceed.

We also remanded for the trial court to correct multiple sentencing errors: (1) failure to stay pursuant to Penal Code

¹ In Shiga's first appeal, he argued the trial court erred in failing to conduct hearings on his competency to represent himself and to stand trial. We agreed and remanded with instructions to the trial court to determine whether it was feasible retrospectively to determine Shiga's mental competency at the time of trial to represent himself and to stand trial, and if it was feasible, whether Shiga was competent in both respects. (*People v. Shiga* (2016) 6 Cal.App.5th 22, 50 (*Shiga I*)). On remand the trial court concluded a retrospective determination of Shiga's competency was feasible, and that at the time of trial Shiga was both competent to represent himself and to stand trial. In *Shiga II*, *supra*, 34 Cal.App.5th 466, we affirmed both determinations.

section 654² Shiga's sentence on count 3 for possession of flammable material; (2) imposition of two 5-year enhancements on count 2 under section 451.1, subdivision (a); and (3) imposition of a five-year enhancement on count 1 under section 451.1, subdivision (a). (*Shiga II, supra*, 34 Cal.App.5th at pp. 483-484.)

On remand the trial court imposed a sentence of 10 years to life on count 1 for aggravated arson and stayed the sentences on counts 2 and 3 under section 654. But the court imposed a determinate term of three years on count 4 for second degree burglary. In Shiga's third appeal he contends, the People concede, and we agree the trial court erred by failing to stay under section 654 the sentence the court imposed on count 4. Shiga also contends, the People concede, and we agree the trial court erred in its calculation of Shiga's custody credit. We stay the sentence on count 4 and affirm the judgment as modified. We also direct the trial court to correct Shiga's prejudgment custody credit to reflect 2,735 actual days of credit.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

An amended information charged Shiga with aggravated arson (§ 451.5, subd. (a); count 1); arson of a structure (§ 451, subd. (c); count 2); possession of flammable material (§ 453, subd. (a); count 3); second degree commercial burglary (§ 459; count 4); and arson of an inhabited structure or property (§ 451, subd. (b); count 5). The information further alleged as to counts 1, 2, and 5 the arson was caused by use of a device designed to accelerate the

² All further statutory references are to the Penal Code.

fire or delay ignition (§ 451.1, subd. (a)(5)); as to counts 1 and 2 Shiga proximately caused multiple structures to burn (§ 451.1, subd. (a)(4)); and as to count 2 Shiga caused property damage exceeding \$3.2 million in value (former § 12022.6, subd. (a)(4)).

B. *The Evidence at Trial*

On April 15, 2011 St. John Vianney Catholic Church in Hacienda Heights was set on fire. The blaze quickly spread to an adjacent rectory where two of the church's priests were sleeping. Both priests safely escaped the flames, but the firefighters were not able to save any portion of the church. Video surveillance footage from inside the church sanctuary showed Shiga lighting a fire on the left side of the altar at approximately 11:54 that night.

In *Shiga II* we described the following evidence at trial.

"Shiga was arrested on May 14, 2012. In a cell at the Norwalk sheriff's station, Shiga spoke to an undercover detective who was posing as an inmate. Transcripts of these conversations were admitted into evidence. Shiga told the detective he had 'burned a church' and it 'wasn't an accident.' Shiga 'didn't think people could get hurt.' He believed the church's priests were doing bad things to children, and thought if he burned the church 'word would get around and they'll stop.'

"Shiga explained to the detective he had stolen a weed sprayer with a backpack attachment, a household cleaning product, toilet paper, and a tiki torch from a home improvement store. Shiga used these tools to set the fire. Shiga went to the church the day of the fire and opened a number of windows so he could reenter that night after the doors were locked. . . .

"Shiga told the undercover detective he returned to the church that night. Some people were there outside the church, and he twice told them to leave. Once they left, Shiga entered

the church through a window. Inside the church, Shiga ‘opened a couple windows’ because ‘a fire needs air—oxygen—because it eats the oxygen.’ Shiga placed the toilet paper tissue on a large cross, as well as next to the drapes on both sides. Shiga sprayed the toilet paper, ceiling, and ‘everything’ with the weed killer. Then he lit the tiki torch and used it to set the toilet paper and drapes on fire. Shiga said he ‘lit all of them and [he] exited exactly the way [he] planned,’ through another window. With the fire burning, Shiga returned to his car and left.” (*Shiga II, supra*, 34 Cal.App.5th at p. 473.)

C. *Shiga’s Conviction and Sentence*

On July 9, 2013 the jury convicted Shiga on all counts and found true all special allegations. The trial court sentenced Shiga to an aggregate state prison term of 18 years to life. The court sentenced Shiga on count 1 for aggravated arson to an indeterminate term of 10 years to life, plus an additional five years (upper term) for the enhancement under section 451.1, subdivision (a)(5), for use of an accelerant. The court selected count 3 for possession of a flammable material as the base determinate term and imposed the upper term of three years. On count 2 for arson of a structure, the court imposed and stayed (§ 654) the upper term of six years, plus four years for the enhancement under former section 12022.6, subdivision (a)(4), the upper term of five years on the enhancement under section 451.1, subdivision (a)(4), and the upper term of five years for the enhancement under section 451.1, subdivision (a)(5), for a total of 20 years. On count 4 for second degree burglary, the court imposed and stayed (§ 654) the upper term of three years. On count 5 for arson of an inhabited structure or property, the court imposed and stayed the upper term of eight years, plus the upper

term of five years for the enhancement under section 451.1, subdivision (a)(5).

D. Shiga II

In Shiga's second appeal, we concluded section 451 criminalizes a single offense of arson, and therefore Shiga could not be convicted of both arson of an inhabited structure under section 451, subdivision (b) (count 2), and arson of a structure under section 451, subdivision (c) (count 5). We reversed Shiga's convictions on counts 2 and 5 and remanded for the People to elect on which count to proceed. We also concluded the trial court erred in failing to stay Shiga's sentence on count 3 for possession of flammable material pursuant to section 654 because count 3 was based on Shiga's possession of the flammable materials he used to commit the offense of aggravated arson for which the court imposed a sentence on count 1. Finally, we concluded the court erred when it imposed a five-year enhancement under section 451.1, subdivision (a), as to count 1 for aggravated arson and two 5-year enhancements as to count 2 for arson of a structure.

E. *Sentencing on Remand*³

On remand, the People elected to proceed on count 2 for arson of a structure, and the trial court reversed the conviction on count 5 for arson of an inhabited structure. The court sentenced Shiga on count 1 for aggravated arson, to an indeterminate sentence of 10 years to life. On count 2 for arson of a structure, the court imposed and stayed pursuant to section

³ Shiga executed a written waiver of his right to be present at the resentencing hearing.

654 the upper term of six years, plus the upper term of five years on the enhancement for use of an accelerant (§ 451.1, subd. (a)(5)) and four years for the property damage enhancement (former § 12022.6, subd. (a)(4)). On count 3 for possession of flammable materials, the court imposed and stayed under section 654 the upper term of three years. On count 4 for burglary, the court imposed the upper term of three years. The trial court awarded Shiga 2,646 actual days of custody credit and 396 days of conduct credit, for a total of 3,042 days of custody credit.

Shiga timely appealed.

DISCUSSION

A. *The Trial Court Erred in Failing To Stay Under Section 654 the Sentence on Count 4 for Second Degree Burglary*

Shiga contends, the People concede, and we agree the trial court erred in failing to stay under section 654 the three-year sentence the court imposed on count 4 for second degree burglary.⁴ Section 654, subdivision (a), provides that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one

⁴ In his sentencing memorandum, Shiga requested the trial court stay the sentence on count 4. However, Shiga’s attorney did not object to the three-year sentence the court imposed at the sentencing hearing. Nonetheless, “[a] claim that a sentence is unauthorized may be raised for the first time on appeal, and is subject to correction whenever the error comes to the attention of the reviewing court.” (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1048, fn. 7; accord, *People v. Dotson* (1997) 16 Cal.4th 547, 554.)

provision.” As the Supreme Court has explained, ““Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.”” (*People v. Capistrano* (2014) 59 Cal.4th 830, 885, overruled on other grounds by *People v. Hardy* (2018) 5 Cal.5th 56, 104; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 354; *People v. Britt* (2004) 32 Cal.4th 944, 951-952.)

It is undisputed that when Shiga entered the church on the evening of the arson, his sole objective was to set the church on fire. Shiga described to the undercover detective while Shiga was in custody that he planned to enter the church through an open window and set the church on fire to stop the priests from harming children. (*Shiga II, supra*, 34 Cal.App.5th at p. 473.) Because Shiga had a single objective in committing aggravated arson (count 1) and second degree burglary (count 4), his sentence for second degree burglary should have been stayed under section 654, as the trial court had done in Shiga’s initial sentencing after trial. (See *People v. Hester* (2000) 22 Cal.4th 290, 294 [“The admitted charging allegations stated that the burglarious entry was perpetrated with the intent to commit the felony assault.’ Under section 654, therefore, the concurrent three-year sentence for the assault count should have been stayed.”]; *People v. Radil* (1977) 76 Cal.App.3d 702, 713 [“Respondent concedes that it was improper to sentence appellant for both assault and burglary where the entry for purposes of assault constituted the requisite act for burglary. The entry for purposes of assault and the assault itself formed one continuous transaction.”].)

B. *The Trial Court Must Correct Shiga's Custody Credits*

Shiga contends, the People concede, and we agree the trial court erred in calculating Shiga's prejudgment actual custody credits at 2,646 instead of 2,735 days. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 23 (*Buckhalter*) ["When, as here, an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the 'subsequent sentence.'"].) Shiga was arrested on May 14, 2012 and resentenced on November 8, 2019. Counting both the day of arrest and the day of sentencing, Shiga was in custody for 2,735 days. (§ 2900.5, subd. (a); *People v. Denman* (2013) 218 Cal.App.4th 800, 814 ["Calculation of custody credit begins on the day of arrest and continues through the day of sentencing."].) On remand the trial court must correct Shiga's presentence custody credits to reflect 2,735 actual days of custody.

However, Shiga's contention his conduct credits must be increased lacks merit. At the resentencing hearing, the trial court calculated Shiga's conduct credits as of the date of his original sentencing (396 days of conduct credit calculated at 15 percent of 2,646 days under § 2933.1, subd. (c)). As the Supreme Court in *Buckhalter*, *supra*, 26 Cal.4th at page 29, explained, "[A] convicted felon who has once been sentenced, committed, and delivered to prison, who received all credits for confinement prior to the original sentencing, and who remains behind bars pending an appellate remand solely for correction of sentencing errors, is not eligible to earn additional credits for good behavior as a presentence detainee."

DISPOSITION

The judgment is modified to stay the sentence on count 4. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment reflecting 2,735 actual days of custody credit and to forward it to the Department of Corrections and Rehabilitation.

FEUER, J.

We concur:

PERLUSS, P. J.

RICHARDSON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.